Njagi v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 6947 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E011 OF 2024

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

PETER MUCHIRA NJAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E004 consolidated with E011 and E012 of 2023 by Hon. P.M Mugure(PM) in the Magistrate's Court at Wanguru and Judgment delivered 0n 14th January, 2023)

JUDGMENT

1. The Appellant herein was convicted by Hon. P.M Mugure, Principal Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 6th day of march at Mwea- East sub-county, he caused his penis to penetrate the vagina of MW, a child aged 13 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were on 6th day of march at Mwea- East sub-county, intentionally touched the vagina of MW, a child aged 13 years.

3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called Eight (3) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve (20) years in prison in Sexual Offence no E 05 of 2020 and Ten(10) years in prison on Sexual Offence no E 06 of 2020. The sentences were to run concurrently.

6. Being dissatisfied with the Judgment dated 24th November, 2022, Peter Mucira Njagi appealed to this court on the following grounds:-

   i. That the learned Magistrate erred in points of law and fact in failing to appreciate that the instant matter was not proved to the required standards.

   ii. That the learned trial Magistrate erred in law and fact by failing to appreciate that the charge laid out was incurably defective contrary to Section 214 of the criminal procedure court hence based on quick stand occasioning a serious dereliction of justice.

   iii. That the learned trial Magistrate erred in law and fact by failing to appreciate that the critical elements of defilement were note proved to the required standards occasioning a prejudice.

   iv. That the learned trial Magistrate erred in law and fact when she went ahead and sentence the appellant to a mandatory minimum sentence which has already been declared as inconsistent with *the constitution* of Kenya, 2010.

   v. That the learned trial Magistrate further failed to appreciate that the instant matter was riddled with material discrepancies capable of unsettling the verdict and further misdirected herself on very pertinent issues including reliance on the accused defence to fill the glaring gaps in defence occasioning a serious dereliction of justice.

7. The appellant prays that this appeal be allowed, conviction quashed and sentence set aside.

8. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in the case of David Njuguna Wairimu vs Republic (2010) eKLR where it held:-

> " The duty of the first appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so. Provided it is clear that the court has considered the evidence on the basis of the law and the evidence on basis of the law and the evidence to satisfy itself on the correctness of the decision".

The Prosecution's Case.

9. It was the Prosecution's case that the Appellant defiled MWM (PW2) IN 2019 she lives with her mother however in 2019 she was living with her grans mother. She confirmed to court that she knew the reason why she was in court which is to testify how she was defiled by the appellant she testified that she was 13 years old at the time of the incident. She claimed to have been defiled three times together with her sister. She recalled that on 6/11/2019 they had gone to fetch firewood with her sister where her sister was defiled twice.

10. PW1 testified that on that particular day the appellant was grazing donkeys in the same forest. That he went and called the three girls and he pulled PW2 who was left behind by PW1 and another minor.

11. That after a while the Appellant carried PW1 to the same place he had taken PW2. she told the court that the appellant placed her on the ground and removed her panty. He then removed his trousers and underwear and inserted his penis into PW1'S vagina by force. That thee appellant held her by the neck

and also covered her mouth. She testified that he told the accused that she was in pain but he proceeded to defile her. That she never told anyone of the ordeal.

12. She further testified that on 19th November, 2018 the three girls were playing later they went to look for a friend who is a cousin to PW4 and a son to the Appellant. That the appellant went inside the house covered PW1's mouth and defiled. On this particular case the Appellant promised the two girls Kshs. 100.

13. PW3 who was a Clinical Offficer from Kimbimbi Hospital and produced the outpatient card P. Exhibit 2, P3 form P Exhibit 4 and the Lab test results P Exhibit 5 for PW1. The patient was examined on 24/01/2020 which was over two months after the last time she alleged to have to have been defiled. There was nothing to significant that would have been detected medically save for the perforated hymen.

14. PW5 and PW 6 were teachers at Gathigiriri PrimarySchool where the three girls go to school as well as the son of the accused. They testified that PW5 told PW4 that she had stomach pains in the lower abdomen. They sent the minor to a health centre. The minor later disclosed to them that the Three(3) girls were sleeping with the Appellant. It is stated in their respective testimonies that the minors were partial orphans. They did not have a father and they do not live with the mother. They lived with the grand-mother who passed on during the pendency of the matter. It is alleged that the accused took advantage of their plight and would trade food for sex with them. It is further claimed that hunger pushed the minors to give in due to them being given Kshs. 100/-.

15. PW 8 No 107889 P.C Faith Muloba the investigating officer also testified. That on 24th January, 2020 she received a call from the OCS Wanguru Police Station to rush to Gathigiriri school where she met PW7 the head teacher and two other teachers PW6 and PW5. The unfortunate experience was narrated to PW8 who then after investigations and after the examination of the three minors at the hospital the Appellant was charged in the Three cases.

The Appellant's Case.

16. The Appellant, Peter Mucira Njagi testified in his defense. he stated that he hails from Bambaine Village. De denied having defiled the three minors. That at the alleged time of defilement he was in Limuru trading in vegetables. He stated the he left home on 4th November, 2019. She states that he was not in the area to defile the minor, he claims to have arrived home at 7:30 PM and went to Limuru until 9th November, 2019.

17. He further testified that he was in church(Oasis of Love Church- Ndindiruko) on 17th November, 2019 from 8.00 am until 4:00 PM. He claims that the church he was in is in Ndidiruko and they lived in Bambaine which is about 2KM from his home. He testified he was framed up.

18. He alleged that he did not defile the minors on 18th November, since he had left home at 7 am. That he had gone to clear his plot as Ikurungu which is about 10KM away from his home and he got back at 6PM. He claims that the mother to the minors had a grudge with him as she had attempted to poison his cows. He claims that all facts presented are framed up by neighbours. He called four other witnesses majorly and unanimously testified that the Appellant was not at home at the time of the alleged offences.

19. I have gone through and given due consideration to the trial court's proceedings, the Memorandum Grounds of Appeal filed on 7th March, 2024 and written submissions dated 6th August, 2024 and the Respondent's written submissions dated 20th February 2023. The following issues arise for my determination: -

i. Whether the Prosecution proved its case beyond reasonable doubt.

ii. Whether the Defence places doubt on the Prosecution case.

iii. Whether the Sentence preissued against the Accused was fair and just.

iv. Whether the Prosecution proved its case beyond reasonable doubt.

21. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

22. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. The age of the victim may be proved through the production of a birth certificate or a parent's testimony. The Court of Appeal in Eliud Waweru Wambui vs. Republic (2019) eKLR, held:-

> " There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."

23. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

24. No. 107889 (P8) produced an immunization card marked as MFI - -P.EXH. 4) the card showed that EW was aged 13yyeas at the time of defilement.born on 1st July 2006. that the time of the commission of the alleged offence, V.C was aged 13 years.

25. Regarding identification of an Accused , the Court of Appeal in the case of Nzaro vs Republic (1991) KAR 212 held:-

> " Identification/recognition must be absolutely watertight to justify conviction".

26. Similarly, the Court of Appeal in Shadrack Shuatani Omwaka Vs Republic (2020) eKLR, held:-

> " ....Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for."....

27. It was clear that the offence was committed in the day. I also note that the two minors who were defiled positively identified the Appellant while fetching firewood meaning it was daylight

28. The victim testified that the Appellant was her neighbour and the same was confirmed by the Appellant when he was cross examined.

29. Further the victim also positively identified the Appellant in the dock. In the case of Muiruri & Others vs Republic (2002) KLR 274, the court held that:-

> " .....We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that

on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

30. There is no doubt in my mind that the Appellant was well known to the victim (PW1). It is my finding that the Appellant was positively identified as the perpetrator of the offence by the victim.

31. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person.

32. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

33. It was the clinical officer(PW3) Kimbimbi Hospital testified that she examined the victim that she found that her heimen was perforated.

34. The above findings upon medical examination of PW3 corroborated the evidence tendered by the clinical officer (PW3). I am satisfied based on the testimonies of PW1 and PW2 and the contents of the P3 Form that V.C (PW1) was penetrated on.

35. It is my finding that the Prosecution evidence as tendered was sufficient as they were able to establish the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

36. I dismiss the Appellant's submission of being framed by the victim's grand-mother up as an afterthought. He did not bring up this issue when he had the chance to cross examine the victim and the investigating officer (PW8).

37. In totality, I find that the Appellant's defence did not raise or place a doubt on the Prosecution's case.

ii. Whether the Sentence preferred against the Accused was just and fair

38. The general principles upon which the first appellate court acts in regards to sentencing are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. See Nelson Ambani Mbakaya Vs. Republic 2016 eKLR

39. The penal section for a defilement case for a child of 13 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that: -

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

40. The Appellant was sentenced to 20 years as prescribed by the law and also the circumstance of the case.

41. As I pen off this judgement, I must observe that the circumstances of the offence were rather disturbing. This court finds the conduct of the victim's mother rather perplexing. The mother of the victims does not stay with them. She left the children in the care of their grandmother making them susceptible and vulnerable to offenders. I also note and wonder how she testified as a defence witness and also does not live with the minors in order to assess them.

42. Nothing absolves the Appellant from the offence for which he was properly convicted. I affirm the conviction and the sentence by the trial Court.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).